

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations)
(Thorndale, Texas))

MM Docket No. 99-243
RM-9675

RECEIVED

AUG 23 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: Magalie Roman Salas, Secretary
for direction to
John A. Karousos, Chief
Allocations Branch, Policy and Rules Division
Mass Media Bureau

COMMENTS, OPPOSITION AND COUNTERPROPOSAL
OF ELGIN FM LIMITED PARTNERSHIP

1. Elgin FM Limited Partnership ("Elgin FM") hereby submits its Comments, Opposition and Counterproposal in response to the Notice of Proposed Rule Making ("NPRM"), DA 99-1292, released July 2, 1999. As set forth below, the proposed allotment of Channel *286A, reserved for noncommercial use, at Thorndale, Texas is plainly unwarranted: the underlying circumstances strongly support preservation of that channel for commercial use, whether at Thorndale or in the alternate the community of Thrall, Texas.

2. The proposed noncommercial allotment has its genesis in a comparative proceeding for the only other commercial channel allotted to Thorndale. Six applicants have applied for that channel. Elgin FM is one of those competing applicants. Another of those applicants is the proponent of the instant proposal, Houston Christian Broadcasters, Inc. ("HCBI"). The comparative proceeding has been stalled in pre-designation status. The delay

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was caused, first, by the freeze on comparative hearings arising from Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1995) and second, by the fact that the auction process adopted to replace comparative hearings is not currently available with respect to proceedings involving noncommercial applications. Since HCBI proposed to use the existing vacant (commercial) Thorndale channel for a noncommercial facility, the pending Thorndale applications found themselves in an administrative limbo.

3. HCBI then submitted its proposal to have a second commercial channel allotted to Thorndale. A second channel, available for commercial applicants, may be appropriate, and Elgin FM does not necessarily oppose such an allotment. But HCBI went further, requesting that that second commercial channel be reserved for noncommercial use AND that HCBI be deemed the sole applicant authorized to file for the channel as so reserved. Elgin FM strongly opposes both of those latter proposals.

4. With respect to reservation of the proposed channel for noncommercial service, the Commission has historically disfavored such reservations in the commercial portion of the band. E.g., Grand Junction, Colorado, 11 FCC Rcd 499 (Allocations Branch 1996); Rosendale, New York, 10 FCC Rcd 11472 (Allocations Branch 1995). Attempting to address that, HCBI argues in its Petition for Rulemaking that no other noncommercial channels are available for use in Thorndale because of Channel 6 considerations.

5. But contrary to the tentative conclusion set out in the NPRM, HCBI has not made that essential threshold showing. The

HCBI petition itself simply refers to the Engineering Statement submitted in support of the petition. But the only conclusion that that Engineering Statement comes to is that "[i]t would be difficult, if not impossible, to meet [the Commission's technical] requirements if a channel was workable". Far from conclusively establishing non-availability, this statement strongly suggests that one or more channels are "workable", even though use of such channel(s) might be "difficult". ^{1/} As a result, HCBI has failed to make the essential threshold showing to support the proposed noncommercial reservation of the commercial channel.

6. Moreover, even if no other noncommercial channels were deemed to be available, it has clearly been established that there is a demand for commercial channels in Thorndale. The most direct evidence of that demand is the established fact that at least five applicants have filed for the one commercial channel already allotted to Thorndale. Presumably, therefore, at least four applicants -- i.e., the four commercial applicants which will not be awarded the already-allotted channel if the fifth commercial applicant wins the channel -- would apply for Channel 286A there. Elgin FM, for one, hereby states its intention to take such steps as may be necessary to file for

^{1/} In a Petition for Reconsideration filed by Cameron Broadcasting Company ("Cameron") with respect to the NPRM herein, Cameron has argued that at least one noncommercial channel is available for allotment to Thorndale. While the NPRM indicates that that is not the case, the Cameron Petition was filed after the release of the NPRM and Cameron's assertions have therefore not yet been addressed by the Commission.

Channel 286A in Thorndale as a commercial channel, and if its application is successful, to construct and operate a station on such channel. While commercial channels have been reserved for noncommercial use in some situations, Elgin FM is unaware of any such situation where there were no other commercial channels available for the community in question and there was an already established demand for such channels.

7. With respect to HCBI's request that the channel be granted unilaterally to HCBI, such action would be completely inconsistent with Ashbacker Radio Corporation v. FCC, 326 U.S. 327 (1945) and Commission precedent following that decision. It would also be inconsistent with common sense and fundamental fairness.

8. First, as noted above, a total of five entities have already demonstrated their interest in a commercial channel in Thorndale. Giving such a channel unilaterally to a sixth applicant would obviously deprive the others of their statutory right to compete for the frequency. Even when additional channels which have been shown to be available for other applicants, the Commission has historically declined to reserve a commercial allotment for noncommercial operation. See, e.g., Grand Junction, Colorado; Rosendale, New York, supra. Here, it is acknowledged that no other commercial channels are available at all.

9. Second, while HCBI would understandably prefer to short-circuit the comparative process (whether that process

involves hearing, auctions, or some other administrative mechanism), so too would Elgin FM (and presumably the four other Thorndale applicants). No legitimate basis exists on which the Commission could grant such "short-circuit" treatment to one of the Thorndale applicants and thereby refuse it to all others.

10. This is especially true where the only distinction appears to be the fact that HCBI is proposing a noncommercial operation. The FM Table of Allotments has been strictly divided into noncommercial and commercial portions. While, as mentioned above, some noncommercial operations have been authorized in the commercial band, the fact is that the commercial band has been established primarily for commercial operations. Here no fewer than five applicants have expressly demonstrated their interest in commercial operation in Thorndale (which currently has only one commercial channel allotted to it). To ignore that would be to declare that the interests of a single noncommercial applicant are sufficient to override both the longstanding dedication of the commercial portion of the FM band for commercial operations and the expressed desire of at least five applicants to provide such operations. ^{2/}

^{2/} From a very practical perspective, the HCBI proposal would be contrary to the pecuniary interests of the Federal Government. If Channel 286A were to be allotted as a commercial channel, it would be subject to competitive bidding which would result in some payment to the Treasury (assuming that more than one applicant sought to bid for it -- and since five commercial applicants have already expressed their interest in competing for a Thorndale channel, such bidding may reasonably be expected). But if the channel were to be reserved for noncommercial use, no payments would be made to the government for the use thereof.

11. In addition, Elgin FM notes that Channel 286A, or as upgraded to a C3, could be allotted to Thrall, Texas as that community's first local service. See accompanying Allocation Statement. Thrall is an incorporated city with a current estimated population of 664 (according to the 1995 Texas Almanac Survey of local officials). It has a mayor, a City Hall, its own local school system, fire and police departments, Zip code and post office, at least one church (the Mt. Zion Baptist Church), and an Athletic Booster Club. Id. The 1999 telephone directory lists numerous businesses with a Thrall address, including at least three (Thrall Co-Op Grain Co., Thrall Food Store, Thrall Gin Company, Inc.) whose names identify them with Thrall. Unquestionably, Thrall is a community entitled to its own local radio service.

12. While Thorndale, with a population of approximately 1092, is somewhat larger than Thrall, Thorndale already has an FM channel allotted to it. By contrast, Thrall has no channels allotted to it at all. Thus, allotment of Channel 286A or 286C3 to Thrall would provide a first local service, which would satisfy one of the Commission's allotment priorities. Elgin FM hereby advises the Commission that, if Channel 286A or 286C3 is allotted to Thrall, Elgin FM intends to take such steps as may be necessary to apply for that channel and, if its application is successful, to construct and operate a station thereon.

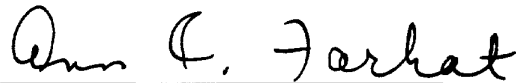
13. Elgin FM also notes that the Cameron Petition for Reconsideration (see Footnote 1, above) poses still more

practical problems relative to the HCBI proposal. Such problems will in any event have to be finally resolved before any action can be taken in the above-captioned proceeding.

14. Elgin FM is already on record as supporting the initiation of commercial FM service in Thorndale, and Elgin FM believes that allotment of Channel 286A or 286C3 -- either to Thorndale or to Thrall -- as a commercial channel would be in the public interest. Elgin FM will take appropriate steps to apply for either channel if it is allotted to either community. As discussed above, however, Elgin FM strongly opposes the reservation of the channel for noncommercial use and the proposed grant of that channel to HCBI.

WHEREFORE, for the reasons stated, Elgin FM Limited Partnership: supports the allotment of commercial FM Channel 286A (or as upgraded to a C3) to Thorndale, Texas; counterproposes, in the alternative, that that channel be allotted to Thrall, Texas; and strongly opposes the reservation of that channel for noncommercial use and/or the unilateral grant of that channel to HCBI.

Respectfully submitted,



Ann C. Farhat

Bechtel & Cole Chartered
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202/833-4190

Counsel for Elgin FM
Limited Partnership

August 23, 1999

ALLOCATION STATEMENT

This statement is prepared on behalf of Elgin FM Limited Partnership ("FM"). This is a challenge to a counter-proposal in the proceeding of Thorndale, Texas. FM is an applicant for Channel 257A in Thorndale, Texas. Houston Christian Broadcasters seeks an alternate Channel 286A as stated in MM Docket 99-243. This allocation is being considered in the face of a mutually exclusive construction permit to Cameron, Texas, Channel 286C3, BMPH-981202. FM seeks a counter-proposal to Channel 286A in Thorndale by proposing Channel 286C3 in Thrall, Texas.

The reference coordinates of Thrall Channel 286C3 are:

Latitude 30°38'45" North, Longitude 97°09'12" West

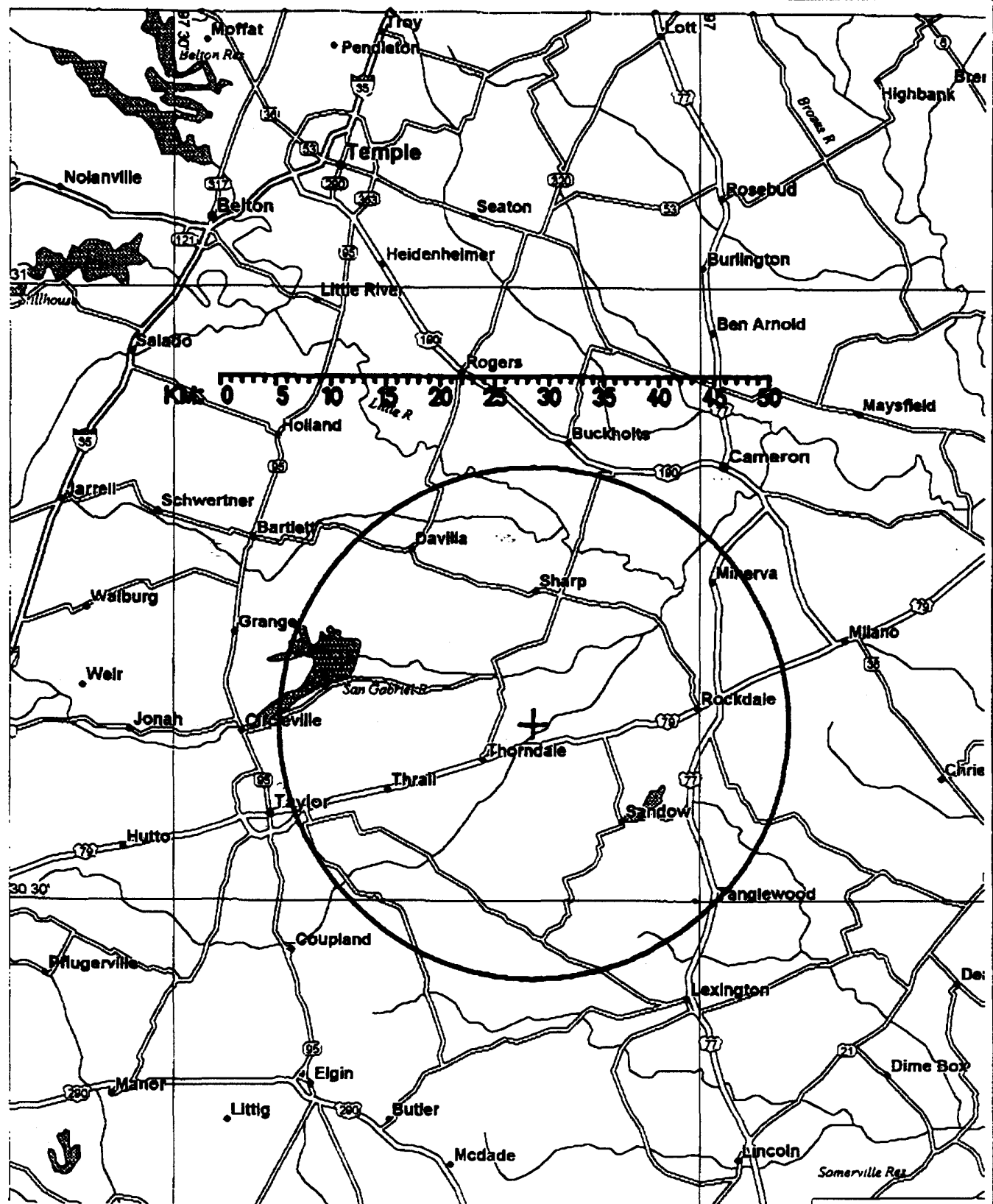
This site is 15 kilometers east (66° True) of the reference coordinates of Thrall, Texas. From this site the entire city of Thrall will be served with the 70 dB μ contour as required by §73.315(a) and §73.315(b) of the FCC Rules as shown in Exhibit A. Exhibit B is an allocation study of this site as Class C3. This demonstrates compliance with all requirements as set forth in §73.207 of the FCC Rules.

Using this reference coordinate, the coverage of this proposed site was calculated according to §73.313 of the Rules. The 60 dBu (1 mV/m) contour will encompass 4,803 square kilometers and 55,826 persons. Thrall, Texas is designated as a Town in the US Census and has a population of 550 persons.

I, John R. Furr, am a Communications Consultant and I represent Elgin FM Limited Partnership. My qualifications are a matter of record with the Commission. All statements made herein are true and correct to the best of my knowledge and belief.

August 3, 1999


John R. Furr



JF&A
COMMUNICATIONS
CONSULTANTS

CITY GRADE CONTOUR

ELGIN FM LIMITED PARTNERSHIP
THRALL, TX
EXHIBIT A

08-02-1999

John Furr & Associates Inc.

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FM Study for: THRALL

FCC Database Date: 8/1999

30-38-45

Location: THRALL, TX

Channel Class: C3

97-09-12

Call City, State

Chan Class Freq kW Latitude Dist.

Required

Status Proponent

File Number HAAT Longitude Azm.

Clear (km)

>>>>>> Study For Channel 286 105.1 MHz <<<<<<<

ALLOC	THORNDAL, TX	286 A	105.1		30-36-54	6.0	142	
ADD	Houston Christian Bro Docket-99-243		0	97-12-18	235.5	-136.0	SHORT	
	Use of 73.215 for short spacing requires:		119		-113.0	SHORT		
NEW	CAMERON, TX	286 C3	105.1	10.	30-51-30	26.4	153	73.215
CP	Roy E Henderson d/b/a BMPH-981202IA	100	97-01-47	26.6	-126.6	SHORT		
	Use of 73.215 for short spacing requires:		142		-115.6	SHORT		
KBAE	MARBLE FALLS, TX	285 C2	104.9		30-36-33	116.67	117	
ADD	Maxagrid Broadcasting Docket-97-124		0	98-22-10	268.3	-0.33	CLOSE	
KBUK	LA GRANGE, TX	285 A	104.9	4.3	29-52-57	89.00	89	
LIC	Fayette Broadcasting BMLH-970318KB	62	96-51-58	161.8	+0.00	CLOSE		
KYUL	HARKER HEIGHTS, TX	288 C2	105.5	33.	30-59-09	59.2	56	
LIC	KCKR-FM, Inc. BLH-990323KB	183	97-37-51	309.6	+3.2	CLOSE		
KBAE	MARBLE FALLS, TX	285 C3	104.9		30-26-45	102.5	99	
ADD	Maxagrid Broadcasting Docket-95-49		0	98-11-45	257.8	+3.5	CLOSE	
KBAE	MARBLE FALLS, TX	285 C3	104.9		30-26-45	102.5	99	
DEL	Maxagrid Broadcasting Docket-97-124		0	98-11-45	257.8	+3.5	CLOSE	
KBAE	MARBLE FALLS, TX	285 C3	104.9	4.1	30-26-34	107.3	99	
CP	Maxagrid Broadcasting BPH-971014IK	245	98-14-48	258.2	+8.3	CLOSE		
KSMG	SEGUIN, TX	287 C	105.3	95.	29-16-29	186.0	176	
LIC	KISS Radio of San Ant BLH-850314LP	381	98-15-52	215.5	+10.0	CLOSE		
KEZB	HEMPSTEAD, TX	287 C3	105.3	9.2	30-18-19	114.5	99	
CP	Farmers Communication BMPH-951130IG	166	96-01-40	109.0	+15.5	CLEAR		
KYKS	LUFKIN, TX	286 C	105.1	100.	31-22-08	252.5	237	
LIC	Gulfstar Communicatio BLH-900827KA	325	94-38-45	70.8	+15.5	CLEAR		
KKYS	BRYAN, TX	284 C2	104.7	50.0	30-42-59	75.3	56	
LIC	RadioSunGroup of Brya BLH-891113KC	87	96-22-20	83.8	+19.3	CLEAR		
KYNG	DALLAS, TX	287 C	105.3	100.	32-35-05	215.7	176	
LIC	Infinity Broadcasting BLH-970909KG	466	96-57-46	4.8	+39.7	CLEAR		

CERTIFICATE OF SERVICE

I, Ann C. Farhat, do hereby certify that on this 23rd day of August, 1999, I have caused a copy of the foregoing Comments, Opposition and Counterproposal of Elgin FM Limited Partnership to be served by first class United States mail, postage pre-paid, on the parties listed below:

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